6

No. 3018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE
(a French corporation),
Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C. MEYER, HERMANN L. E. MEYER, JR., J. W. WILSON, and JOHN M. QUAILE, partners under the style of MEYER, WILSON & COMPANY,
Appellees.

REPLY BRIEF FOR APPELLANT.

LOUIS T. HENGSTLER,
GOLDEN W. BELL,
Attorneys for Appellant.

FERNAU PUBLISHING CO., SAN FRANCISCO

Index.

Table of Authorities.

No. 3018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE
(a French corporation),
Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C. MEYER, HERMANN L. E. MEYER, JR., J. W. WILSON, and JOHN M. QUAILE, partners under the style of MEYER, WILSON & COMPANY,
Appellees.

REPLY BRIEF FOR APPELLANT.

I. ANSWER TO ARGUMENT ON PAGES 5-20 OF APPELLEES' BRIEF.

To support the contention that the facts of this case "raised the presumption of her unseaworthiness on sailing", appellees cite the following cases:

(1) *Work v. Leathers,* 97 U. S. 379;

(2) *The Warren Adams,* 74 Fed. 413;

(3) *The Aggie,* 93 Fed. 484;

(4) *Pacific Coast SS. Co. v. Bancroft, Whitney Co.,* 94 Fed. 180;

(5) *The Arctic Bird,* 109 Fed. 167;

(6) *Oregon Lumber Co. v. P. & A. SS. Co.,* 162 Fed. 913;

(7) *SS. Wellesley Co. v. C. A. Hooper & Co.,* 185 Fed. 735;

(8) *Carolina Portland Cement Co. v. Anderson,* 186 Fed. 145;

(9) *The River Meander,* 209 Fed. 931;

(10) *Benner Line v. Pendleton,* 210 Fed. 671.

(Brief for Appellees, pp. 14-20.)

None of these cases support appellees' contention. No presumption of law such as is claimed exists in the law. The only legal presumption applying, in the absence of proof to the contrary, is that a vessel is seaworthy when she leaves her port of departure. In case, however, the fact appears that she begins to leak soon after leaving port without an adequate cause explaining this fact, the inference may be warranted that she was not seaworthy when she set sail. This, however, is never a presumption of law —such as is the presumption of seaworthiness on departure—but is merely an inference by which the Court is warranted to find logically a supposititious prior fact from a proved subsequent fact. Obviously such an inference is not warranted in the presence of actual proof that she was inspected, and made and found seaworthy as a matter of fact.

We proceed to show that the cases cited have no bearing on the instant case.

(1) In *Work v. Leathers,* the shaft of the steamer's engine, which was shown to be too small

for the strain upon it, broke; the cylinder head of engine blew out when the chartered boat was in smooth, deep water, carrying only 100 pounds of steam. There was proof that she was old and approaching the end of her life as a ship, and that she suddenly failed in a vital part without any apparent cause. It was also shown by the fracture of the shaft that the crack in the shaft had existed some time.

On these facts the lower court held that the *presumption of seaworthiness was rebutted* (Fed. Cas. No. 17,415).

Consequently this is not a case of *presumption* of unseaworthiness on sailing, but a case where the proof shows that the vessel was in fact unseaworthy on sailing; in other words, a case where the initial *presumption of seaworthiness* is overthrown by the facts.

(2) The citation from *The Warren Adams* is clearly dictum. The Court said:

"In the present case the question of the burden of proof is an academic rather than a practical one. The vessel had been tried by violent seas for 36 hours before she sprang a leak. It is not surprising that the oakum should have worked out of some of the seams in the violent straining to which the trunk must have been subjected."

This is therefore a case where the *initial presumption of seaworthiness* was supported by the facts.

(3) In the case of *The Aggie* the District Judge simply repeated the dictum of the *Ada Warren* case, in an academic enumeration of rules relative to seaworthiness, but without application to the facts then before the Court.

(4) In the case of the *Queen of the Pacific,* decided by this Court, the presumption of initial seaworthiness is recognized. In that case the vessel had sprung a leak *within 12 hours* after leaving the port of San Francisco, having encountered nothing unusual on the voyage. Of course such facts overthrow the presumption of seaworthiness; but the case has obviously no bearing on the case at bar, where the steamer was thoroughly inspected before leaving port, but after ten days, during part of which she encountered stormy weather, developed a leak.

(5) In *The Arctic Bird* the barge sank with her cargo *six hours* after starting in tow, having proceeded through an ordinary sea. Under such circumstances Judge DeHaven's *"conclusion from the evidence"* (109 Fed. 170) that she was unseaworthy, was clearly warranted.

The evidence in the case at bar is very different; for here it appears that the vessel was inspected with the greatest care; that seven days after leaving Rotterdam she met with

a moderate gale with cross seas, and that two days thereafter a leak appeared caused by the loosening of a rivet in the steamer's bottom. Such evidence warrants a different conclusion from that drawn in the case of The Arctic Bird; it certainly would not warrant "a presumption of unseaworthiness on sailing".

(6) In the *Oregon Lumber Co's* case the facts were that an old barge, which had been twice extensively overhauled and repaired—the last time five years before the accident—which had not been surveyed by any one having skill, and the interior timbers of which were shown to have been broken, sank with a cargo of coal. Even while being loaded she filled with water and could be kept barely afloat only by pumping; the bargemaster "was able to pump out in 10 hours what would run in in 24" (162 Fed. 917). The water gaining rapidly while she was discharging her coal into a steamer, she finally capsized and sank.

These facts show that she was unseaworthy from the beginning. Judge Wolverton's question (italicized by counsel for appellees): "How else could her condition be accounted for?" was very apropos in the case of this barge, but it would be difficult to extend it argumentatively to the very different facts of the case at bar.

(7) In the case of the *Steamship Wellesley Co.* the accident occurred in the port of Eureka, while the vessel was being towed out of port, and before she had reached the bar. The "strong presumption of unseaworthiness", clearly warranted by such facts, has certainly no bearing upon the instant case.

(8) In the *Carolina Portland Cement Co.* the presumption of unseaworthiness was predicated upon the following facts: (1) the schooner sprang a leak *within a few hours* after leaving port; (2) no perils of the sea had been encountered; (3) her steam pumps broke down when put in use. The presumption referred to could not be extended from such facts to the facts in the instant case, where (1) the leak was not apparent until ten days after sailing; (2) perils of the sea had been previously encountered; (3) the steamer had entered the port of Brest, floating obstructions being not unusual in ports; (4) the leak occurred through the loosening of a rivet; (5) the pumps were and remained in good condition during two months of strenuous use.

(9) Referring to the words quoted from *The River Meander,* it is sufficient to remember that, in the case at bar, the shipowner used unusual means to know that his ship was sea-

worthy before the voyage began, and that he has proved it by the European depositions. It also appears that the impact with a floating obstruction while the vessel was being towed to Brest, or while she entered or left Brest, would be a more reasonable and probable explanation of the loosening of the rivet than the assumption that the vessel, in spite of the careful inspection, was unseaworthy at her departure from Rotterdam. Had she then been unseaworthy, the leak would have made its appearance during the three days' voyage to Brest, or at any rate before the lapse of ten days.

(10) In the case of *Benner Line v. Pendleton,* a schooner, within three days after leaving port, suddenly sprang so serious a leak that she was in danger of sinking, and after a few days did sink with her cargo. While the language used by the Court and cited by counsel is warranted when applied to such facts, it has no application to the fundamentally different state of facts in the instant case.

A cursory examination of all the cases cited shows that, granting that the principles referred to properly govern the facts of each of these cases, they have not even a remote bearing upon the case at bar.

II. ANSWER TO ARGUMENT ON PAGES 21-33 OF APPELLEES' BRIEF.

Appellees state that:

> "On November 22nd, the 'Duc d'Aumale' then being in 49° 37′ south latitude and 66° 21′ longitude, the weather and sea increased, *as was to be expected,* necessarily subjecting the vessel to greater strains than those experienced either in the moderate weather of September or in the fair weather subsequent thereto. *The result was that the leakage immediately increased* to such proportion that the master, after consultation with the crew, decided to run for the Falkland Islands."
>
> (Brief, p. 21.)

> "While the weather met on and after November 22nd was much more severe than the moderate weather of September, *it was the kind of weather to be reasonably expected in the lower latitudes in the vicinity of Cape Horn at that season of the year. The opinions of the shipmasters were in unanimous accord on that point."* (Italics ours.)
>
> (Brief, p. 25.)

> "It was a pure case of leakage developing under the stress and strains of weather which the 'Duc d'Aumale' was *almost certain to meet on the voyage around the Horn."*
>
> (Brief, pp. 31-32.)

From these statements of counsel it follows that the master of the "Duc d'Aumale" knew, after his vessel began to leak in September that, if he should persist in continuing his voyage around the Horn, he "was almost certain to meet on the voyage around the Horn" precisely the fate which his

vessel did meet in fact. He could have avoided this fate on innumerable occasions before it overtook him by resorting to a port for repairs; but instead of this he wilfully determined, day after day for two months, to defy the fate which was reasonably to be expected. Does it not follow from this conclusively that the efficient cause of the damage to appellees' cargo was the master's act in so navigating his vessel, and that, if the danger and loss was to be reasonably expected in the unanimous opinion of shipmasters, the cause of this damage was not only error, but positive fault in the navigation of the vessel? Appellees draw a different conclusion from their statement of facts, viz.: that "the influx of water was due to unseaworthiness", but their conclusion leaves out of account the cardinal fact that the acts of the master constituted an intermediate cause, disconnected from any assumed primary fault of the owner, which cause, self-operating, produced the injury. The causal connection between the assumed original negligence of the owner and the damage to the cargo was broken by the interposition of an independent responsible human action. The damage resulted legally from the faults in the navigation or management of the vessel, and not from the assumed unseaworthiness at starting on the voyage. As Holmes, J., expressed the principle:

> "The general tendency has been to look no further back than the last wrongdoer, especially

when he has complete and intelligent control of the consequence of the earlier wrongful act."

Clifford v. Cotton Mills, 146 Mass. 47, 49.

III. ANSWER TO ARGUMENT ON PAGES 34-37 OF APPELLEES' BRIEF.

A. Hull.—From the condition of the vessel as it was found to be on drydocking at Buenos Ayres, appellees draw deductions as to her condition when she left Rotterdam. This seems hardly fair when it is remembered that she had been lying, in the interval, on the beach at Roy Cove for nearly three months. Considering that, during this period, she had been buffeted there by winds and waves of a notoriously severe character, her subsequent condition at Buenos Ayres testifies to one fact only, that she must have been originally a vessel of quite remarkable staunchness.

B. Stowage.—The stowage was made in a port which, for the stowage of this particular cargo, had a practical monopoly; it was made in the customary way and according to the best judgment of stevedores of exceptional experience in that particular line. No better ~~or~~ a prior test exists. The master based his opinion that the cargo was well stowed upon "the way in which the ship behaved at sea" (Apostles, p. 186). No better ex post facto test exists. Counsel claims that the stowage was "condemned" by the surveyors in Buenos Ayres. The record discloses no evidence for such an assertion.

The master testified that "the change was advised by the surveyors. Myself, I did not see any objection to it, all the more because *it was an economy of time*" (Apostles, p. 187). In other respects the master considered the change in the method of stowage unnecessary, and gave it as his opinion, supported by reasons based upon his knowledge of the ship, that the original method was the better one. (p. 189) It is certain that the judgment of the stevedores and surveyors at Rotterdam, who had unusual experience with such cargoes and exclusive knowledge of the character of the ship, is more valuable on a practical question like stowage than the opinions of chance surveyors at Buenos Ayres, whose qualifications are not in evidence, and of post mortem experts at San Francisco who were called upon by appellees to make an imaginary loading of an unknown ship by mathematical formulae.

IV. ANSWER TO ARGUMENT ON PAGES 37-40 OF APPELLEES' BRIEF.

This argument simply disregards the principal issue of this case. No one denies the existence of an implied warranty of seaworthiness. Conceding, for the purposes of this case, the strict rule of the cases cited, that the carrier is bound to respond for any loss of, or direct damage to, goods in consequence of a breach of the implied warranty of seaworthiness, *it does not follow* that he is subject to the same

measure of liability for damages caused by an independent human agency, such as the faults of the master in navigating the ship. In all the cases cited by appellees the cargo suffered loss or direct damage by reason of the unseaworthiness of the ship at the commencement of the voyage. A clear distinction, however, exists between the loss of or direct damage to goods on account of unseaworthiness, and the consequences of a subsequent independent human act. In the case of The Carib Prince cargo was damaged by water flowing from the peak tank through a rivet hole into the cargo hold. In the case at bar the cargo would never have been damaged but for the active fault of the master in the navigation and management of the ship. The courts have recognized the distinction between loss caused by unseaworthiness, and loss suffered subsequently to unseaworthiness at the commencement, but not caused by such unseaworthiness. Thus, in the case of *Kopitoff v. Wilson,* cited with approval in *The Caledonia,* 157 U. S. 124, 131-132, Blackburn, J., left the following questions to the jury: "Was the vessel at the time of her sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season * * *? Second. *If she was not in a fit state, was the loss that happened caused by that unfitness?"*

Our contention is this: We concede that, where the loss is *caused by unseaworthiness,* the owner of the ship, although he has used due diligence, is

liable, unless he has expressly reduced his liability by contract. But in the case at bar the facts show clearly that the loss claimed *was not caused by unseaworthiness* (assuming, for the sake of this argument only, such to have existed), but that the loss was the direct and legal consequence of a human act, or series of human acts, constituting fault in the navigation and management of the ship of an aggravated kind. Under the general law the shipowner would not be held liable for such damage, although his ship failed to comply with the absolute warranty of seaworthiness; for no man is liable except for damage caused by *his* act. In addition to this, the Harter Act protects this shipowner, who certainly exercised due diligence to make his vessel in all respects seaworthy, by expressly providing that "neither his vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss *resulting from* faults or errors in navigation or in the management of said vessel."

V. ANSWER TO ARGUMENT ON PAGES 41-44 OF APPELLEES' BRIEF. (SEAWORTHINESS).

This subject is thoroughly covered by our opening brief, and nothing of value can now be added to it. Appellees, while contending for the actual unseaworthiness of the "Duc d'Aumale" at her sailing from Rotterdam, admit that "*they may have exercised due diligence to make her seaworthy*" (Brief, p. 42).

VI. ANSWER TO ARGUMENT ON PAGES 44-48 OF APPELLEES' BRIEF.

Appellees *grant* "that due diligence was exercised to make the 'Duc d'Aumale' seaworthy", but contend that, notwithstanding this fact, appellant "cannot invoke the immunity against negligence in management or navigation of the vessel afforded by the third section of the Harter Act".

The reason, and the only reason, given for this contention is that "the efficient cause of the damage to the cargo was not negligence in management or navigation of the 'Duc d'Aumale', but her unseaworthiness". If this reason is invalid, appellees' contention must fall with it, and it then follows that appellant's contentions are correct.

Now it is almost mathematically demonstrable from appellees' own statements that the reason above given is not valid, and that any alleged unseaworthiness of the ship (denied by appellant and disproved by the evidence) is *not* the efficient cause of the damage to the cargo.

Appellees state that "the fact remains that it was the increase in leakage in the unseaworthy hull of the 'Duc d'Aumale' caused by the strains of the heavy seas encountered off the Falkland Islands, threatening her safety, which operated as the efficient cause of the * * * subsequent damage to the cargo" (Brief p. 45). Assuming this to be correct, and adding to it appellees' admission that severe weather was "to be reasonably expected in the lower latitudes in the vicinity of Cape Horn at that

season of the year'' (Brief, pp. 25, 30), is it not a logical consequence of these two statements that the future ''increase in leakage'' near Cape Horn ''was to be reasonably expected'' by the master two months before, and was the natural sequence of his persistence on the course which would naturally lead to the increase in leakage, and therefore naturally create the very condition which appellees admit to be ''the efficient cause of the subsequent damage to the cargo''? Appellees admit that ''the youthful master did not return to port for repairs when he discovered his ship making water'' (Brief, p. 45), and thereby impliedly admit that he could have gone into a port for repairs (p. 45).

The failure to put in for repairs, and his actions after September 29th, in determining the question, how to get his ship crew and cargo to a place of safety, was primarily and essentially a question of navigation, as shown by the authorities cited in our opening brief. Our contention relative to the bearing which the case of *Corsar v. J. D. Spreckels & Bros. Co.,* 141 Fed. 260, has upon the instant case remains unshaken, and is confirmed by the comment made upon this case by appellees on pages 45 and 46 of their brief.

Appellant has no quarrel with the views which this Court took of the situation in *Pacific Coast SS. Co. v. Bancroft-Whitney Co.,* 94 Fed. 180. In that case the Queen, within twelve hours after leaving the port of San Francisco, sprang an uncontrollable leak and was deliberately run to the beach

at Port Hartford to save ship, crew and cargo. Of course the legal cause of the damage to the cargo was the leak in the steamer. The act of the master was analogous to the act of the third party who instinctively threw the squib which caused the damage, and whose act, though intervening between defendant's act and plaintiff, is not considered the proximate cause of the damage. This is to be distinguished from the case of the voluntary act of a responsible person which is not the natural consequence of an original condition, but is, as in the case at bar, an unnatural decision defying injurious consequences which are to be expected. Here the master's act was not merely "a link in the chain of causes of injury", but was the proximate cause which produced the damaging effect.

VII. ANSWER TO ARGUMENT ON PAGES 48-49 OF APPELLEES' BRIEF.

The novel point is made that there is no evidence as to the *manning, equipping or supplying* of the "Duc d'Aumale" and that, for that reason, the protection of the Harter Act cannot be invoked. The conclusive answer is, that none of these items are in issue under the pleadings in this case, and that, consequently, the proper manning, equipping and supplying is either admitted or presumed by law.

The libel alleges that the barque was "tight, staunch and strong, and every way fitted for the

agreed voyage'' (Ap. p. 13). The answer denies this and "in this behalf said defendants aver that * * * at the time of said barque sailing from Rotterdam, her *hull* was in an unseaworthy condition and the said cargo on board said barque was *improperly stowed''* (Ap. p. 35). Again it is alleged in the answer "that the damage and injury aforesaid to the said cargo was * * * caused * * * *solely* by the negligence of the owners and master of the said ship in this, that the said ship at the time of sailing from said Rotterdam was in an unseaworthy condition as to the hull thereof, and was improperly stowed'' (Ap. p. 36). Evidence as to the manning, equipping or supplying of the 'Duc d'Aumale' was unnecessary, their sufficiency being admitted and no issue relative to these matters being presented by the pleadings.

VIII. ALL THE DAMAGE TO THE CARGO WAS CAUSED BY THE CAPTAIN'S FAULT IN NAVIGATION.

The answer of appellees admits this fact, and we mention it because the question might naturally occur, whether any of the damage was caused by the original leak. In this respect the answer avers "that the submersion thereof, as well in the ship *while seeking a port of refuge as thereafter while she was stranded,* saturated the said cargo with salt water and further injured the same'' (Ap. p. 37). The previous injury referred to was injury involved in discharging the cargo at Buenos Ayres, after the

barque had left the Falkland Islands. In describing the *coke* damage the answer alleges "that by reason of the submersion of the coke in the hold of the said vessel *during the voyage entered upon to said port of refuge and during several weeks while she lay on the beach at Falkland Islands,* the said coke was saturated with salt water etc." The voyage to said port of refuge occurred between November 22 and November 25, 1907, and she lay on the beach for nearly three months thereafter. It is therefore admitted that the coke was not damaged until nearly two months after the first leak on September 29, when the period of the master's faults in navigation commenced, and that the entire damage to the coke occurred after the voyage to Port Stanley was entered upon, and after November 22, 1907.

This is also confirmed by the allegations of appellees' libel, wherein it is stated that the discharge of the cargo was required at Buenos Ayres, "which discharge involved great damage thereto and that the submersion thereof, as well in the ship *while seeking a port of refuge, as thereafter while she was stranded,* saturated the said cargo with salt-water and further injured the same" (Ap. p. 18). All the damage to the cargo admittedly occurred after November 22, 1907.

IX. CONCLUSION.

The following appear clearly as the salient features of this case:

First. On September 19, 1907, the ship with her cargo sailed from Rotterdam.

Second. On September 29th, after some rough weather, a leak was discovered, and regular daily pumping began.

Third. For nearly two months the master, instead of going to a port for repairs, continued with his leaking ship, past many ports where he could have found safety, on a voyage into dangerous seas where every navigator expects to encounter conditions apt to test the endurance of the staunchest ships.

Fourth. On November 22, 1907, with the expected increase of weather and sea, the leakage immediately increased to uncontrollable proportions, as was to be expected, and the sinking ship was run on the beach.

Fifth. From November 25, 1907, to February 13, 1908 (nearly three months), the ship lay on the beach, buffeted by the winds and waves, her cargo being submerged.

The bare statement of these facts suggests at once the legal cause of the stranding of the ship and the damage to her cargo. Both ship and cargo would have been safe, had they been taken into port; the danger to each, and subsequent damage, was caused by the wilful act or acts of the master in taking ship and cargo, with knowledge of the ship's precarious condition, into waters where her troubles could be normally expected.

We respectfully submit that the decrees of the District Court should be reversed, and a final decree ordered in favor of appellant for freight, with interest and costs.

Dated, San Francisco,
December 24, 1917.

LOUIS T. HENGSTLER,
GOLDEN W. BELL,
Attorneys for Appellant.